IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

82-5093

MORRIS ODELL MASON,

Petitioner

v.

EDWARD C. MORRIS,

Respondent

PETITION FOR WRIT OF CERTIORARI

Counsel for Petitioner
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(ii) the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance or . . .

(iv) at the time of the commission of the capital felony, the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired.

STATEMENT OF THE CASE

Procedural Posture

On May 13, 1978, Margaret K. Hand was murdered in Nassawadox, in Northampton County, Virginia. According to the coroner's report, her assailant had hit her twice with an ax, once in the head and once in the side; the chair in which she was lying was then set afire. On May 15, 1978, Petitioner Morris Mason was arrested in connection with the murder of Mrs. Hand and attacks on two other women. Petitioner gave statements to the sheriff's deputies, stating that he had raped and then murdered Mrs. Hand. The coroner's report showed no evidence of spermatazoa or semen. Mr. Mason was then charged with capital murder-- murder in the commission of a rape -- in connection with the death of Mrs. Hand, and counsel was appointed to represent him. On September 28, 1978, Petitioner pled guilty in the Circuit Court for the County of Northampton, the Honorable N. Wescott Jacob, presiding, to the charge of capital murder-- murder in the course of a rape. On September 29, 1978, the trial court held the sentencing phase of the bifurcated capital trial; on October 10, 1978, the post-sentence report having been completed and received into evidence, the trial court imposed a sentence of death.

Petitioner appealed his conviction and death sentence to the Virginia Supreme Court, which affirmed the judgment in Mason v. Commonwealth, 219 Va. 1091 (1979). This Court denied Petitioner's Petition for a Writ of Certiorari. 444 U.S. 919 (1979).

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QUESTIONS PRESENTED

1. Was the representation afforded Petitioner by trial counsel within the range of competence demanded of attorneys in criminal cases?

2. Did the trial court rule correctly in imposing the burden on Petitioner to establish prejudice from the errors and omissions of counsel?

3. If Petitioner did bear the burden of establishing prejudice by a preponderance of the evidence, did Petitioner meet that burden?

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JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), in that Petitioner claims that his conviction violated the Sixth and Fourteenth Amendments of the United States Constitution. The order of which review is sought is the order denying Petitioner's Petition for Appeal in the Virginia Supreme Court, dated April 20, 1982.

CONSTITUTIONAL PROVISIONS

The constitutional provisions involved in this Petition for Writ of Certiorari are the following:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

U.S. CONST. AMEND. VI

> All person born or naturalized in the United States . . . are citizens of the United States of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

U.S. CONST. AMEND. XIV.

STATUTES INVOLVED

The statutory provision involved here is Va. Code Ann. §19.2-264.4 (Cum. Supp. 1977):

> A. Upon a finding that the Defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the Defendant shall be sentenced to death or life imprisonment . . .
>
> B. . . . Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the Defendant, and any other fact in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: . . .

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On January 2, 1980, Petitioner filed a Petition for Writ of Habeas Corpus in the Circuit Court for the County of Northampton. In this Petition, Petitioner alleged, inter alia, that he was denied the effective assistance of counsel at and in connection with the sentencing phase of his capital trial, in violation of the Sixth and Fourteenth Amendments to the United States Constitution. A copy of that passage of the Petition is appended to this Petition for Writ of Certiorari. The court granted Petitioner's request for a plenary hearing on his claim that his trial counsel had been ineffective; all other claims were denied by order entered on April 8, 1980. The plenary hearing was held on April 25, 1980. Throughout this Petition for Writ of Certiorari the transcript of this hearing will be cited as (T.__).

In the court's written Findings of Fact and Conclusions of Law, entered on March 17, 1981, the court denied Petitioner's claim of ineffective assistance of counsel. The court's final order was entered on April 15, 1981, to which Petitioner objected. Copies of the Findings of Fact and Conclusions of Law and the order are appended to this Petition. Petitioner timely filed his Petition for Appeal with the Virginia Supreme Court, which was denied by order dated April 20, 1982. A copy of that order is appended to this Petition.

Psychiatric Examination

One of Petitioner's trial counsel, Henry P. Custis, testified that the nature of the crimes, Mr. Mason's statements to them, and his behavior in confessing on a lie-detector test to two more capital murders led them to suspect that Mr. Mason might have a psychiatric defense in exculpation or mitigation. (T. 51, 55, 57).

On May 22, 1978, the General District Court for Northampton County ordered that Petitioner be evaluated by Dr. W.

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A. Dietzgen, of the Eastern Shore Mental Health Center; in a report dated May 26, 1978, Dr. Dietzgen stated that, in his opinion, Petitioner was competent to stand trial.

At the request of defense counsel, Petitioner was admitted to Central State Hospital on May 30, 1978, to evaluate only "his competence to stand trial and sanity at the time of the alleged offenses."

At no time was the staff at Central State Hospital specifically directed by the court or requested by defense counsel or the Commonwealth's Attorney to examine Mr. Mason for the presence of mitigating mental abnormality as defined in Va. Code Ann. §19.2-264.4(B) (ii) and (iv). T. 9, 45).

At no time during Mr. Mason's commitment in 1978 did the psychiatrists at Central State Hospital ever conduct an evaluation of Mr. Mason that would have enabled them to give an opinion as to the presence of mitigating mental abnormality. (T. 9, 38). Both Dr. Dimitris and Dr. William M. Lee, the forensic psychiatrist and psychologist, respectively, who examined Mr. Mason, testified that the examinations conducted during Mr. Mason's commitment in 1978 were insufficient to enable them to form any opinion as to the presence of mitigating mental abnormality. (T. 15-16, 29, 35-36, 106).

During Mr. Mason's commitment to Central State Hospital in May, 1978, he denied any wrongdoing in his discussions of the crimes with the staff (T. 10, 107), even though he had previously given numerous statements to police officers and jailers implicating himself in the capital offense. The Central State staff were not aware of these statements, and did not have copies of them during Mr. Mason's hospitalization. (T. 10).

Both Dr. Dimitris and Dr. Lee testified that the detailed examination necessary to assess mitigating mental abnormality requires an opportunity to discuss the details of the offense with the defendant and to confront him with any prior

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confessions. (T. 10, 12-13, 108, 115).

On June 27, 1978, Dr. Dimitris wrote to General District Court Judge Willis, asking for additional information, including copies of statements by Mr. Mason and statements from the jailers and others who had observed Mr. Mason between the time of the offense and the time, some two weeks later, when he arrived at Central State Hospital.

Petitioner left Central State Hospital on July 11, 1978, to return to jail to await trial. Thus, when copies of the statements finally came to Dr. Dimitris on August 15, 1978, Petitioner was no longer at Central State Hospital, and the staff was unable to question Petitioner about the statements. Both Dr. Dimitris and Dr. Lee testified that an informed clinical opinion concerning mitigating mental abnormality, as distinguished from "legal insanity," could not have been based on a review of the statements, standing alone, without an opportunity to question Mr. Mason in person; it is the process of confrontation itself that is valuable for clinical analysis (T. 134). These answers were not made in the abstract; at the hearing, the Commonwealth introduced a videotape of a news interview with Petitioner, filmed immediately after the sentence of death was handed down. That was the first time that Dr. Dimitris had seen Petitioner discuss the crimes. Dr. Dimitris testified that his viewing of the videotape raised serious questions in his mind about "inappropriate affect" and about Mr. Mason's reported drug consumption, questions that he had not previously had occasion to ask Mr. Mason. (T. 126, 134).

Mr. Custis testified that he had told Mr. Mason to cooperate fully with Dr. Dimitris and Dr. Lee (T. 41); he indicated that he believed that Mr. Mason had told him that he had cooperated fully, though Mr. Custis was not sure (T. 42). Mr. Custis further testifed that he had not been aware during the

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time when he was representing Mr. Mason that his client had not in fact cooperated with Dr. Dimitris and Dr. Lee. (T. 66). He testified that, had he known that his client had not cooperated, he would have requested another examination. (T. 61, 65).

On August 23, 1978, Dr. Dimitris wrote a letter to the court, stating that, in his opinion, Mr. Mason was competent to stand trial and that he had been sane at the time the offense had been committed. Mr. Custis testified that he had read the reports that Dr. Dimitris had filed with the court, that he had sent for a copy of the full hospital record, and that he had read that record. (T. 83).

Mr. Mason's Central State record includes numerous interview notes and staff conference summaries which state that Mr. Mason denied any involvement in the capital offense with which he was charged. (Petitioner's Exhibit 1). With the exception of a letter from Mr. Custis to Dr. Dimitris requesting a copy of the Central State record, neither Dr. Custis nor his colleagues ever communicated directly with Dr. Dimitris or Dr. Lee; they never discussed the doctors' examination or findings with them. (T. 13, 17, 42, 44).

Mr. Custis testified that he was not knowledgeable about the procedures used by forensic psychiatrists, and that he did not know what information they would need to formulate their opinions. (T. 57).

Mr. Custis testified that he and his colleagues did not believe Dr. Dimitris could be helpful because Dr. Dimitris' report to the court had been negative on the question of legal insanity. (T. 45).

Mr. Custis testified that he and his colleagues obtained the discharge summaries from the Veterans' Administration hospitals in Northport, New York, and Coatesville, Pennsylvania, indicating that Mr. Mason was a paranoid schizophrenic; however, they did not attempt to obtain the

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detailed records themselves. At the capital sentencing phase of Petitioner's trial, they introduced into evidence only the discharge summaries. (T. 46).

The Trial

On September 28, 1978, Petitioner pled guilty to capital murder, against the advice of counsel. On September 29, 1978, the sentencing hearing was held, at which the only evidence consisted of the report of Dr. Dietzgen, the two reports from Dr. Dimitris, a copy of the 1972 order civilly committing Petitioner to Eastern State Hospital, and the summary of the record of Petitioner's hospitalizations in the Veterans' Administration Hospitals in Northport, New York, and Coatesville, Pennsylvania, in 1974. No psychiatric testimony was introduced. At that time, the trial court indicated that it expected to impose the death penalty; however, imposition of sentence was delayed until a post-sentence report could be completed.

On October 10, 1978, the post-sentence report had been completed and was received into evidence. Between September 29 and October 10, Mr. Custis and co-counsel Mr. Phillips made no further efforts to develop any mitigating evidence. On October 10, 1978, the trial court imposed the sentence of death.

The First Complete Examination

After the plenary hearing on April 25, 1980, when it had become apparent that Petitioner had never been examined for mitigating mental abnormality, counsel for both sides requested that Petitioner be examined by Dr. Dimitris, to determine whether any such evidence existed. The order requiring the examination was entered on May 14, 1980. Dr. Dimitris responded by letter dated July 14, 1980. Dr. Dimitris' letter gave a bifurcated opinion; Dr. Dimitris could not determine whether the statements given to Investigator K. E. Collins by Petitioner were true (in which case no mitigating mental abnormalities would have been

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present) or whether Mr. Mason's statements to the examiners at Central State Hospital were true (in which case mitigating mental abnormalities certainly would have been present). Unable to resolve this factual question, Dr. Dimitris could not give an authoritative answer.

Petitioner then moved the court to allow him to be examined while under the influence of sodium amytal, so that Dr. Dimitris might be able to resolve this factual inconsistency. By order entered December 8, 1980, to which the Petitioner objected, the request was denied.

ARGUMENT I

THE TRIAL COURT ERRED IN RULING THAT PETITIONER HAD NOT BEEN DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL TRIAL.

This Court has held, in McMann v. Richardson, 397 U.S. 759, 770-71 (1970), that the proper test for determining whether counsel was ineffective is whether counsel's assistance "was within the range of competence demanded of attorneys in criminal cases." The trial court employed the McMann test, as refined by the Fourth Circuit in Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977); cert. denied 435 U.S. 1011 (1978).

A. Petitioner's Evidence Shows That His Trial Attorneys Failed to Explore, Develop and Present Available Evidence of Mitigating Mental Abnormality And Therefore Establishes a Prima Facie Case of Ineffective Assistance of Counsel, in Violation Of the Sixth and Fourteenth Amendments to the United States Constitution.

Petitioner's evidence showed that counsel failed to explore, develop, and prepare available evidence of mitigating mental abnormality.

The various errors and omissions of counsel are spelled out in great detail in the Statement of Facts, and will only be summarized here, as follows:

1. Although counsel stated that they knew that Morris Mason's sole hope was to find a mitigating mental abnormality,

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and although counsel knew that Mr. Mason had been diagnosed as a paranoid schizophrenic in the past, had been under psychiatric care previously, and had committed bizarre crimes, counsel never sought to have Petitioner examined for mitigating mental abnormality. The examiners were not requested to conduct such an evaluation, and they did not do so. The examination which they did conduct did not, and could not, provide an adequate clinical predicate for an opinion on mitigating mental abnormality. When defense counsel read the report submitted by Dr. Dimitris, noted that there was no mention of the presence or absence of mitigating mental abnormality, and yet they still failed to contact the examiners or to ask the court for a further examination of Mr. Mason on these issues. Although defense counsel subsequently (on September 13, 1978) renewed their request for an independent examination, the request was again limited to the issues of legal sanity and competency to stand trial.

The inescapable conclusion is that counsel did not understand the concept of mitigating mental abnormality, or at least did not understand its legal significance.

2. At no time did defense counsel ever contact the psychiatrists, in whose assistance they professed to be so interested, to discuss the evaluation or to ascertain the specific bases for the opinions rendered in the report to the court. The critical significance of this omission is apparent in the record; a simple telephone call would have disclosed

a. that Mr. Mason had denied his involvement in the capital murder; and

b. that the examiners could not formulate any opinion concerning the presence or absence of mitigating mental abnormality without Mr. Mason's cooperation, his candid discussion of the crimes themselves, and an opportunity to confront him with his earlier statements to the sheriffs.

3. This critical omission could have been rectified if

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counsel had subsequently realized the restricted scope of the Central State evaluation. This opportunity was presented when counsel received a copy of the Central State Hospital record since Mr. Mason's non-cooperation was fully apparent on the face of those records. The court must therefore infer either that counsel failed to read the records or that counsel failed, incompetently, to realize the critical significance of the information contained therein.

4. The evidence presented at the capital sentencing phase of Petitioner's trial was so meager and so bereft of any development or explanation as to be worthless.

Counsel's omissions were of critical magnitude in the context of Petitioner's case, and they establish a prima facie case of a denial of his right to the effective assistance of counsel.

The issue of ineffective assistance of counsel, under the McMann standard, is best discussed by asking this question: What would have reasonably informed and prepared defense counsel have done on behalf of their client in this case? It is important to note that the standard depends on the circumstances of the individual case:

> The normal competency standard is necessarily broad and flexible because it is designed to encompass many different factual situations and circumstances.

Marzullo v. Maryland, 561 F.2d at 544. See also Washington v. Strickland, 673 F.2d 879 (1982), rehearing enbanc granted, ___F.2d___ (5th Cir. May 14, 1982).

One overriding circumstance to be considered is the fact that this is a capital case. Because the stakes are higher in a capital case than in any other criminal case, counsel's actions might well determine whether his client lives or dies. Because of the "qualitative difference between death and other penalties" Lockett v. Ohio, 438 U.S. 586, 604 (1978), counsel

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must, as Mr. Custis noted, "pull out all the stops." (T. 68). The range of competence demanded of attorneys in capital cases assumes that those attorneys "pull out all the stops," by, at the very least, fully investigating available "defenses" in exculpation or mitigation of sentence. To say that the range of competence is higher in a capital case is not to pose a double standard; rather, it simply recognizes the obvious: the degree of experience, preparation and skill necessary to adequately defend a capital case is much greater than that required to defend a shoplifting charge. See Washington v. Strickland, 673 F.2d at 884 n.1, quoting Knight v. State, 394 So.2d 997, 1001 (Fla. 1981); Voyles v. Watkins, 489 F.Supp. 901 (N.D.Miss. 1980).

The special, bifurcated sentencing procedure employed in capital cases raises issues of diminished responsibility and psychiatric nuance not characteristic of most criminal trials in Virginia. Under Va. Code Ann. §19.2-264.4(B), a life sentence may be imposed, among other reasons, if the trier of fact finds either that "the defendant was under the influence of extreme mental or emotional disturbance," or that "the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired." Thus, presentation of the case-in-mitigation at the sentencing phase of a capital murder trial requires exploration of mitigating mental abnormality as an indispensable and central feature of the defense effort.

Several lower courts have brought the abstract language of McMann into sharper focus in specific cases, holding that trial counsel has the duty to "conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed." Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied 393 U.S. 849 (1968). Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979), vacated as moot 446 U.S. 903 (1980); Blake v. Zant, 513 F.Supp. 772 (S.D.Ga. 1981).

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In recent cases in the Fourth Circuit alone, this rule has been applied in two habeas corpus proceedings in which convictions were voided under the Sixth and Fourteenth Amendments because counsel had failed to explore possible defenses of insanity. In Wood v. Zahradnick, 578 F.2d 980, 982 (4th Cir. 1978), the attorney had failed to obtain any psychiatric evaluation of the possible existence of alcohol psychosis at the time of a rather bizarre offense. Judge Haynesworth stated that the defendant's Sixth Amendment right to effective assistance of counsel imposes

> [a] correlative duty on defense counsel to undertake reasonable steps to investigate all open avenues of defense. The circumstances [here] clearly suggest that an exploration of his mental condition was such an avenue.

Similarly, in Brennan v. Blankenship, 472 F.Supp. 149 (W.D.Va. 1979), a conviction for malicious wounding was set aside in a habeas corpus proceeding because counsel failed to pursue a possible insanity defense. The district court ruled that "the failure to pursue the possible tactical advantage" provided by a psychiatrist's testimony, which indicated that the defendant was psychotic on the day of the shooting, "constituted a professional omission of critical magnitude." Id. at 158. See also Brooks v. Texas, 381 F.2d 619 (5th Cir. 1967); In re Saunders, 2 Cal.3d 1033, 88 Cal.Rptr. 633, 472 P.2d 921 (1970).

Because application of the McMann test is necessarily contextual, comparison of cases to glean general notions of what is or is not effective assistance is extremely difficult; the resulting argument tends to be anecdotal rather than analytical. However, one general principle may be drawn from the cases cited -- when the defendant is, or may be, mentally or emotionally disturbed, an attorney who fails adequately to explore psychiatric defenses has not rendered his client effective assistance. In Springer v. Collins, 444 F.Supp. 1049, 1060

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(D.Md. 1977), the court concluded from the cases of the Fourth and Fifth Circuits (applying the McMunn standard) that the failure to investigate fully a psychiatric defense would be outside the "range of competence demanded of attorneys in criminal cases" where the following indications were present:

> evidence of mental problems, existing either prior to or at the times of the offense, known or reasonably ascertainable by trial counsel; absence of other substantial or inconsistent defenses; and pendency of serious charges.

All three of these indications were present in Petitioner's case.

In the present case, Mr. Mason pleaded guilty to capital murder. Moreover, the prosecution's case-in-aggravation at sentencing was substantial. Thus, the only real issue in the case was whether mitigating factors were present; indeed, Mr. Mason's only "defense" against the death penalty was presentation of a case-in-mitigation based on mitigating mental abnormality. Yet, the record is clear that counsel took inadequate steps to explore, develop and prepare evidence in mitigation. Counsel at no time asked the court to order Petitioner to be examined for mitigating mental abnormalities; indeed, they did not even call Dr. Dimitris or Dr. Lee to ask them whether their investigations had disclosed anything helpful. Seeing that the report contained no mention whatsoever of mitigating mental abnormality, they made no efforts to find out why.

Because counsel had not asked for such an examination, none was made. Thus the psychiatrists could not have given an opinion on the subject, even had they been asked. Mr. Custis repeatedly complained that there was nothing that they could do -- no evidence that they could present -- in mitigation; the reason, of course, is that they had made no effort to explore the question with the examiners.

In sum, counsel failed to take the minimal steps necessary to explore, develop, and prepare a case in mitigation.

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In the context of a capital trial, this failure was so serious as to fall outside of the range of competence normally demanded of attorneys in criminal cases. Counsel did not fulfill their duty "to undertake reasonable steps to investigate all open avenues of defense. The circumstances clearly suggested that an exploration of his mental condition was such an avenue." Wood v. Zahradnick, supra, at 982. In failing to investigate mitigating mental abnormality, counsel denied Mr. Mason his Sixth Amendment right to the effective assistance of counsel.

B. The Trial Court Erred in Requiring Petitioner To Establish Prejudice from Any Act or Omission Of Counsel.

In so ruling, Judge Russo took half of the McMann standard - the "range of competency" test - and mixed it with half of the old "farce and mockery of justice" standard, see Slayton v. Weinberger, 213 Va. 690, 694 (1973). Slayton v. Weinberger, having been based on Betts v. Brady, 316 U.S. 455, 473 (1942), held that the burden is on the Petitioner to show prejudice. The court's curious amalgam is supported by no currently valid case law.

The trial court, in its ruling from the bench on October 16, 1980, reflected in the order of December 8, 1980, held that Petitioner "bears the burden of establishing his claim of ineffective assistance of counsel by a preponderance of the evidence, and that Petitioner must establish prejudice from any act or omission of counsel." This Court has indicated that, once the prima facie case of ineffective assistance of counsel is established, a petitioner bears, at most, a burden of demonstrating that counsel's omissions were not haimless beyond a reasonable doubt. This Court has concluded that

> [t]he assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'

Holloway v. Arkansas, 435 U.S. 475, 489 (1978), quoting Chapman

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v. California, 386 U.S. 18, 23 (1967). It is therefore not an element of Petitioner's case to prove that he was harmed by counsel's failure to render effective assistance; rather, such harm or prejudice is presumed from the determination of ineffective representation.

> The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.

Glasser v. United States, 315 U.S. 60, 76 (1945).

In discarding the "farce and mockery" standard, the courts have abandoned its baggage as well. Consistent with the more realistic, modern "range of competence" standard of the Sixth Amendment rationale is the rule, frequently stated by this Court in cases such as Holloway, supra, and Chapman, supra, that ineffective assistance of counsel cannot be harmless error.

This Court has most recently reiterated that position in Cuyler v. Sullivan, 446 U.S. 335 (1980). There, the defendant was bringing a habeas corpus claim based on ineffective assistance of counsel as a result of joint representation. The Court held that the writ should not be granted, because Sullivan had not shown the existence of an actual conflict. In discussing the case law on point, however, the Court noted that, had Sullivan been able to show an actual conflict of interest, he would have been entitled to a new trial.

> [A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. See Holloway, supra, at [435 U.S. 475,] 487-91. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.

Id. at 349-50. In other words, ineffective assistance of counsel will not be presumed from the fact of joint representation, but prejudice will be presumed on a showing that the joint

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representation rendered counsel ineffective. See also Geders v. United States, 425 U.S. 80 (1976); Herring v. New York, 422 U.S. 853 (1975).

The Court's decision in Holloway explains the reason for a "no harmless error" rule. In that case, the issue was whether the defendants were required to prove prejudice in a case in which the court required joint representation in the face of timely objection. Although the facts are a bit different, the legal principle is clearly analogous. "Prejudice" and "harm" are, of course, synonymous; joint representation over objection of counsel is automatic grounds for reversal because the courts are instructed that the resulting representation is automatically ineffective. Chief Justice Burger, for the Court, rejected the argument that harm must be shown; a harmless-error rule

> would not be susceptible of intelligent, even-handed application. In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. . . But in a case of joint representation of conflicting interests the evil -- it bears repeating -- is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

435 U.S. at 490-91.

The only difference between Holloway and an ineffective assistance case such as the instant case is that in joint representation cases, it is assumed that the reason that counsel

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refrained from taking certain actions is that there was a conflict of interest; in ineffective assistance cases, the reason that counsel did not take certain actions may be negligence, incompetence, laziness, or ignorance. But the reason is not important to the question of whether there has been ineffective assistance; once the reason has been established, prejudice is presumed. Regardless of the reason, the criminal defendant has not received the benefit of his Sixth Amendment guarantee of the effective assistance of counsel.

Chief Justice Burger's reasoning about the difficulty of review is directly applicable to the instant case as well; the trial record does not reveal the harm. In this case the evil is what the advocate refrained from doing. The error does not appear readily on the face of the record, and its scope cannot be readily identified. Accordingly, the reviewing court can have no confidence in its conclusion concerning the likelihood that the error materially affected the deliberations of the factfinder. It was to avoid such unguided speculation that this Court has held that error will be presumed upon a showing of actual prejudice.

Most of the Circuits have recognized that the "range of competence" test requires a rejection of the rule that placed the burden on the defendant to show by a preponderance of the evidence that he had not been harmed by counsel's ineffective assistance

> There is no substantial consensus among the circuits as to the kind or degree of prejudice that a Petitioner must show before he may obtain federal habeas relief on ineffective assistance grounds; yet for at least some types of cases, a large majority of the twelve Circuits appear to require a showing by the Petitioner of some prejudice. The Third, Eighth, Ninth, and District of Columbia Circuits clearly require a showing of prejudice, and have well-developed positions on the topic. The Second and Fourth Circuits also clearly require a showing of prejudice, although their

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> positions on this issue are not as fully developed. There are some indications that the First and Seventh Circuits also require a showing of prejudice. The Tenth Circuit has addressed the issue, but appears to be undecided. Only the Sixth Circuit appears to have rejected the prejudice requirement altogether, although there are reasons to believe that it is reconsidering its position.

Washington v. Strickland, 673 F.2d 896-900.

A Circuit-by-Circuit analysis of opinions concerning necessity for demonstrating some prejudice would be misleading inasmuch as the circuits also differ significantly on the question of how much prejudice would have to be shown. See 673 F.2d 896-900, nn.11-20, for a detailed recitation of the standards as they vary among the circuits. Of course, in Washington v. Strickland, the Fifth Circuit adopted the rule that Petitioner urged upon the trial court, upon the Virginia Supreme Court, and that Petitioner urges on this Court:

> If the Petitioner carries the burden of showing ineffectiveness and prejudice, the State may then attempt to show beyond a reasonable doubt that although counsel's ineffectiveness was prejudicial to the Petitioner, in the sense that the trial would have proceeded in different and more helpful way in the absence of these errors by counsel, counsel's ineffectiveness was harmless in that it did not contribute to the Petitioner's sentence within the meaning of Chapman and its progeny.

673 F.2d at 902. The Fifth Circuit thus join the Third Circuit and the Eighth Circuit; See United States ex rel. Johnson v. Johnson, 531 F.2d 169, 177 (3rd Cir.) cert. denied, 425 U.S. 997 (1976); McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974).

The only allocation of the burden of proof that is logically consistent with the McMann standard is the allocation described in Washington. When a court applies the McMann test concerning the question of whether counsel was ineffecive, it must also apply the Washington rule allocating the burden of proof on prejudice. Such an allocation gives the Commonwealth a chance to argue that the ineffective assistance is harmless

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error, but the burden is on the Commonwealth to prove that the error was harmless beyond a reasonable doubt.

The Fifth Circuit has held that the relevant standard for determining when prejudice has occurred is to consider the question of whether "the trial would have proceeded in a different and more helpful way in the absence of these errors by counsel." Id. at 902. There can be no doubt but that the introduction of the evidence concerning Petitioner's diagnosis as a psychotic, his long history of mental illness, and the other psychiatric evidence that could have been adduced would have constituted substantial evidence in mitigation of punishment, and would have been "helpful."

In view of the high stakes involved in death penalty cases this Court should be extremely reluctant to find that a significant omission of mitigating evidence could ever be harmless.

As an analogy, Petitioner looks to Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), amended on rehearing, 648 F.2d 446 (5th Cir. 1981), question certified to Supreme Court of Georgia, ___ U.S. ___ 72 L.Ed.2d 272 (1982). In Stephens, the Fifth Circuit, noting the fact that the process of weighing aggravating and mitigating evidence is still not susceptible of great structure, held that the imposition of the death sentence pursuant to more than one aggravating circumstance, when at least one of those aggravating circumstances was thrown out on appeal, invalidates the imposition of the death sentence altogether. If the process by which a fact finder weighed the evidence in aggravation and the evidence in mitigation, and therefore decided to impose the death penalty, were regulated by firm rules and standards, the outcome might be different. But where, as in that instance, the quality of the evidence in mitigation would have been significantly altered by competent counsel, it can never be

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said that such an omission could constitute harmless error. Because of the finality of the death sentence and its qualitative difference, this Court has long required an extra measure of reliability in the proceedings leading to the imposition of the death sentence. Lockett v. Ohio, 438 U.S. 586, 604 (1978).

After the plenary hearing on April 25, 1980, the trial court granted the Petitioner's motion, joined in by the Commonwealth, that Petitioner be returned to Central State Hospital for further examination by Dr. Dimitris. It was so ordered, and, by letter dated July 14, 1980, Dr. Dimitris reported back to the court with his findings. Dr. Dimitris' testimony and correspondence established the following facts in support of Petitioner's contention that there was evidence which would tend to establish the existence of a mitigating mental abnormality:

1. In his report to this court dated July 14, 1980, Dr. Dimitris offered a "bifurcated opinion." He stated that:

> a. If the statements given to Investigator K.E. Collins and appended to the testimony of the officer on September 28, 1978, specifically from Pages 51-70 on, are the facts of the case, then it is my opinion that Mr. Mason was able to formulate an intent after premeditation and deliberation with malice aforethought.
>
> b. Yet, if the facts are those that Mr. Mason presented to us during his examinations at Central State Hospital June 3, 5 and 11, 1980 (which are appended), he was at best "a hairs' breath" distant from unconsciousness and coma and due to that was unable to formulate an intent, deliberate, premeditate, and act with malice, because of reported heavy intoxication.

2. In a letter to Petitioner's counsel dated September 4, 1980, a copy of which is in the record of these proceedings, Dr. Dimitris stated that he was unable "to elaborate any further on the subject matter."

3. Dr. Dimitris' letters of July 14, 1980 and September 4, 1980, indicate that his opinion concerning the

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degree to which Mr. Mason's psychological functioning was impaired at the time of the offense depends on the factual predicate for such an opinion:

a. If asked to base an opinion on Mr. Mason's face-to-face account (in June, 1980), Dr. Dimitris' conclusions regarding the degree of Petitioner's intoxication would support a claim of mitigating mental abnormality, as defined by Virginia law.

b. If asked to base an opinion on Mr. Mason's recorded statements to the police (in May, 1978), Dr. Dimitris' testimony would not support any claim that Mr. Mason lacked the mens rea for capital murder, but Dr. Dimitris would be unable to offer any opinion on mitigating mental abnormality.

4. Dr. Dimitris has stated, in a written statement submitted to the court (a letter from habeas counsel to Dr. Dimitris on October 7, 1980, as countersigned by Dr. Dimitris) that he has "no clinical basis for forming any opinion concerning which account (the transcripts of Mr. Mason's statements to the police in May, 1978) or his statements to [Dr. Dimitris] in June, 1980 more accurately or fully reflects his mental condition at the time of the capital offense."

This evidence demonstrates that if Mr. Mason's capital sentencing proceeding were held today, Dr. Dimitris' testimony would at least raise a substantial issue of fact concerning the presence of mitigating mental abnormality at the time of the offense. Similarly, if Dr. Dimitris had conducted this examination before Mr. Mason's capital sentencing trial in September and October, 1978, probative evidence tending to raise a substantial issue of fact concerning the presence of mitigating mental abnormality would have been available to counsel at that time.

If Mr. Mason's counsel had been aware of this information, it seems indisputable that they would have called upon Dr. Dimitris to testify, and to explain to the court what his "bifurcated" conclusions meant. Ultimately, it would have

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been the responsibility of the factfinder to assess the reasons for the differences between the two accounts. In considering this question, the sentencing court would have been asked, by competent counsel, to consider some of the following possibilities:

1. Mr. Mason's statements to the police may be an incomplete predicate for an assessment of mitigating mental abnormality. A police interrogation is not designed to probe subtle questions of mental functioning. Police are not trained to elicit clinically relevant details or to observe mental state. The apparent discrepancies between the two accounts may, in this sense, be illusory because the police had neither the interest in probing the details of Mr. Mason's claim of intoxication nor the skill to do so.

2. To the extent that his two accounts are inconsistent, Mr. Mason's statements to the police may be less reliable than his statements to the examiners at Central State Hospital.

a. In light of his "mild retardation" (his I.Q. scores have ranged from 67 to 79), Mr. Mason may be highly suggestible; he may have been simply "going along" with the sheriffs in signing his confession, as Dr. Dimitris testified at the plenary hearing. (T. 30).

b. Mr. Mason may have distorted some of the facts in his confession (T. 18), for reasons that may relate to emotional or psychological factors. For example, he may have told the sheriffs that he had raped Mrs. Hand (there is absolutely no corroborating evidence of penetration or attempted penetration) because he may have thought or wished that he had.

In summary, the testimony by Dr. Dimitris, which counsel failed to explore, develop and present, would have raised a substantial issue of fact concerning Petitioner's mental functioning at the time of the capital offense. Moreover this

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factual question could not have been resolved then -- and cannot be resolved now -- simply by discounting the reliability of Mr. Mason's account of his offenses to Dr. Dimitris. Instead, the reliability of the contrasting accounts would itself have been an issue of fact; on this issue, as well, the availability of expert testimony by Dr. Dimitris would have been of assistance to the factfinder.

Because the evidence which counsel failed to produce could have raised an issue of fact concerning mitigating mental abnormality and could have affected his sentence, Petitioner has established that the patterns of omissions by counsel were not harmless beyond a reasonable doubt.

The psychiatric evidence shows that there is a substantial issue of fact as to whether Mr. Mason was in fact suffering from a mitigating mental abnormality at the time that he killed Margaret Hand. It cannot now be said as a matter of law that Mr. Mason was not suffering from a mitigating mental abnormality; nor can it now be said as a matter of law, on the evidence now before this Court, that the trial court could not have found that Mr. Mason was suffering from a mitigating mental abnormality at the time of the offenses. Nor can it be said as a matter of law that the sentence would not have been affected by such a finding.

Reasonably diligent, informed and prepared counsel would have developed evidence that would at least have raised a factual issue in mitigation which would have been relevant to the application of the death sentence. In this regard it is clear that counsel's failures caused harm to Petitioner; it most certainly cannot be said that the failures were harmless beyond a reasonable doubt.

CONCLUSION

As noted above, the state court was clearly wrong in

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holding that Petitioner was denied effective assistance of counsel at and in connection with the sentencing phase of his capital trial. But Petitioner prays this Court to hear this case not merely to rectify the injustice to him; the issues raised herein are important questions, on which an authoritative determination by this Court is necessary. This Court has not had occasion to give content to the text enunciated in McMann v. Richardson, 397 U.S. 759 (1970). This Court has never established which party has the burden of demonstrating prejudice, and what burden that party must meet. These are issues that recur not only in Virgina, but in every state of the Union. These questions come up not only in capital cases, but in every case. Ineffective assistance of counsel claims are being raised with great frequency in habeas corpus petitions, and the District Courts and Circuit Courts have all developed different standards. Petitioner prays this Court to grant his Petition for Writ of Certiorari to hear the questions presented herein, and to resolve this conflict.

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MAILING CERTIFICATE

I, P. Guthrie Gordon, III, a member of the bar of this Court, make oath that, on or before July 19, 1982, I caused this

Petition for Writ of Certiorari, along with the accompanying Motion to Proceed In Forma Pauperis and the supporting Affidavit, to be deposited in a United States Post Office or mailbox, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, pursuant to Rule 28.2. I further make oath that I caused on copy of each of the above-mentioned documents to be sent to the Honorable James E. Kulp, Senior Assistant Attorney General for the Commonwealth, 101 North Eighth Street, Richmond, Virginia, 23219, by depositing the documents in the United States Post Office or mailbox, with first class postage prepaid.

F. Guthrie Gordon, III

NOTARIAL CERTIFICATE

STATE OF VIRGINIA

AT LARGE, to-wit:

The foregoing instrument was subscribed and sworn before me on this 19th day of July, 1982, by F. Guthrie Gordon, III.

Notary Public

My commission expires: June 18, 1984

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